INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	12

CITATIONS

Cases:

Berger v. *United States*, 295 U. S. 78 11
Bogardus v. *Commissioner*, 302 U. S. 34 9
Calderon v. *United States*, 207 F. 2d 377, certiorari granted, 347 U. S. 1008, No. 25 this Term 7
Commissioner v. *Jacobson*, 336 U. S. 28 9
Montgomery v. *United States*, 203 F. 2d 887 10
Old Colony Trust Co. v. *Commissioner*, 279 U. S. 716 9
Powers v. *United States*, 223 U. S. 303 10
Smith v. *Manning*, 189 F. 2d 345 9
United States v. *Block*, 88 F. 2d 618, certiorari denied, 301 U. S. 690 10
United States v. *Heitner*, 149 F. 2d 105, certiorari denied *sub nom. Cryne* v. *United States*, 326 U. S. 727 10
Wilson v. *United States*, 162 U. S. 613 10

Statute:

Internal Revenue Code of 1939, Sec. 145 (26 U. S. C. 1952 ed., Sec. 145) 2

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 249

LESTER H. BURDICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 28–38) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 39) was entered July 1, 1954. The petition for a writ of certiorari was filed July 29, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether petitioner was entitled to suppression of a net worth statement he gave to a revenue agent, on the ground that the agent failed to warn him of his constitutional right not to incriminate himself.

3. Whether the trial court should have declared a mistrial because of alleged misconduct on the part of the prosecutor.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> * * * * *
>
> (26 U. S. C. 1952 ed., Sec. 145.)

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STATEMENT

On September 17, 1952, petitioner was indicted in the United States District Court for the District of New Jersey on charges of wilfully attempting to evade income taxes for the years 1946 through 1950 by filing fraudulent returns,[1] in violation of Section 145 (b) of the Internal Revenue Code. (R. 1, 5–8.)[2] The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1946)	$2,986.29	$282.49	$13,495.76	$3,228.47
Count II (1947)	2,376.70	261.57	15,422.55	4,235.67
Count III (1948)	3,077.92	311.74	8,881.48	1,376.72
Count IV (1949)	2,174.17	161.72	8,495.60	1,302.04
Count V (1950)	4,868.09	641.72	11,106.58	1,947.90

After a jury trial petitioner was found guilty as charged, and on May 15, 1953, he was sentenced to concurrent terms of imprisonment for a year and a day on each of the five counts. (R. 472–473.)

The investigation of petitioner's returns for the years in question began with a conference between Special Agent Gerson, petitioner, and

[1] Individually for the years 1946 and 1947, and jointly (for himself and his wife) for the years 1948, 1949 and 1950.

[2] References to the Appendix for appellant will be designated "R.", and references to the Appendix for appellee will be designated "R.' ".

petitioner's accountant, Willits, a former internal revenue agent. Gerson stated at the outset that he was a representative of the intelligence unit, and advised petitioner that he did not need to answer any questions if he did not wish to do so. Petitioner answered a great many questions and voluntarily turned over his bank records and cancelled checks. He said that he had no other formal records and that he had always destroyed all informal records in the shape of notes and memoranda as soon as his annual return had been filed.[3] At Gerson's request petitioner agreed to submit a net worth statement showing his assets and liabilities as of January 1, 1946, and December 31, 1950. (R. 26–27, 31–34, 42, 59–62, 417–420; R.' 1–3.) About two weeks later Willits brought in the statement (Gov't. Ex. 6) which he had prepared with petitioner's assistance.[4] (R. 27–28, 137–138, 465.)

Revenue agents made an independent investigation to determine the accuracy of petitioner's statement, and they also analyzed his cancelled checks to determine his nondeductible expenditures for the years involved. (R. 43–57, 157–158.) At the trial they testified to the follow-

[3] Willits received no information from petitioner in preparing his returns except a summary statement and withholding forms. (R. 133–135.)

[4] The agents also held two subsequent interviews with petitioner during the investigation. (R. 420–423.)

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ing results of their investigation (R. 160–163, 196–223):

	Net Worth Increase	Expenditures
1946	$3,818.78	$6,078.80
1947	8,446.46	8,822.77
1948	805.64	12,035.45
1949	3,716.35	7,451.01
1950	3,986.64	7,668.71

Petitioner's actual net taxable income, calculated on this basis, exceeded his reported income in the amounts shown in the following table (R. 207–208, 212–213, 214, 215, 216):

	Actual	Reported
1946	$8,401.27	$2,[illegible].20
1947	14,772.47	2,376.70
1948	8,035.92	3,[illegible].92
1949	8,237.94	2,176.17
1950	9,937.07	4,[illegible].79

Petitioner attacked the computation on the ground that some of the assets attributed to him actually belonged to his wife, i. e., two insurance policies, Government bonds worth $3,000, and two parcels of real estate valued, respectively, at $1,750 and $22,500. However, the Government's computation had not included the increase in the cash surrender value of the insurance policies, but only the amount of the premiums actually paid by petitioner himself. (R. 44, 206–207, 212, 214, 215, 216.) And there was abundant evidence to indicate that the bonds (R. 57, 430; R.' 2–3, 44–51) and the real estate (R. 44, 64, 78, 80, 427, 429, 437; R.' 5, 52–57), which peti-

tioner himself had included in the statement submitted to Special Agent Gerson (R. 465), belonged to him rather than to his wife.

The Government also proved that petitioner had received numerous specific sums which he had failed to report as income. Several witnesses testified that they had paid him from $500 to $2,000 annually for services or favors which petitioner had done for them by reason of his position as executive clerk of the New Jersey State Senate. Petitioner admitted receipt of all these payments but contended that they were gifts. (R. 388–412.) Most of the witnesses who had made these payments characterized them as "gifts," but they also admitted that petitioner had performed services for them in connection with state legislation. (R. 99–131, 165–195.) Two witnesses testified that they had made small payments to petitioner which were clearly intended to purchase "protection" for gamblers. (R.' 9–31.) He flatly denied one of these and attempted to explain the other as a payment for radio advertising. (R. 424–425; R.' 31–39.) The substantial nature of these specific receipts is shown by the approximate annual totals in the following table (R. 99–100, 107–109, 122, 124, 165, 169, 176, 182, 184–188, 389, 400, 409–410):

1946	$1,900
1947	3,500
1948	3,000
1949	5,700
1950	4,900

The jury were instructed that gifts were not taxable and that they must determine from the evidence whether the specific payments to petitioner were actually gifts or remuneration for services performed. They were also instructed that they must eliminate from consideration any assets of Mrs. Burdick in determining the increases in petitioner's net worth. (R. 453–460.)

ARGUMENT

1. Petitioner contends (Pet. 13–15) that the Government's net worth computation included assets belonging to his wife, i. e., the insurance policies, the bonds and the real estate, and that the computation was, therefore, insufficient to support the verdict. He argues that the only evidence to connect him with these assets was his own admission in the net worth statement submitted at Agent Gerson's request, and that such an uncorroborated admission is insufficient under the rule of *Calderon* v. *United States,* 207 F. 2d 377 (C. A. 9th), certiorari granted, 347 U. S. 1008, No. 25, this Term. A similar contention is urged with respect to the amount of cash at the starting point. The argument is without merit, for, regardless of the correctness of the rule laid down by the Court of Appeals for the Ninth Circuit in the *Calderon* case, the present record contains abundant independent evidence of the *corpus delicti* in the form of third-party testimony as to the numerous specific sums paid

to petitioner and unreported by him. Consequently, there is present in this record independent proof of the *corpus delicti* which the Ninth Circuit held to be fatally deficient in *Calderon*, and even under the rule of that case the question of the truth of petitioner's conflicting and evasive testimony as to cash on hand and his wife's ownership of certain assets (see, *e. g.*, R.' 39–57) was correctly submitted to the jury under adequate instructions (R. 453–460).

Petitioner argues further (Pet. 15–17) that the evidence established that the unreported specific payments were nontaxable gifts, and that the trial court should have so ruled as a matter of law. It is quite true that most of the Government's witnesses on this issue characterized their payments to petitioner as "gifts". But it is also clear from their testimony that he was rendering them valuable services annually through his legislative connections. (R. 100–105, 110–111, 122, 124–125, 168–169, 171–173, 181–182, 184, 188.) Furthermore, there is evidence that petitioner did not regard these payments as uncertain and purely gratuitous but expected them to continue, for, although his reported gross income for the years involved never exceeded $6,000 (Pet. 35),[5] he nevertheless stated that he had an annual income of $10,000 when applying in 1948 for a loan on

[5] The reference is to the opinion of the court below. Petitioner's returns, though introduced at the trial (R. 25), are not included in the record before this Court.

the house purchased in the name of his wife (R.' 4–6). Whether the payments to petitioner constituted compensation or gifts depended on the real intent of the donor and donee. *Smith* v. *Manning,* 189 F. 2d 345, 348 (C. A. 3d). See also *Commissioner* v. *Jacobson,* 336 U. S. 28, 50–51; *Bogardus* v. *Commissioner,* 302 U. S. 34, 40–42, 43, dissenting opinion 44–45; *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 730. In view of the conflicting evidence as to the intent of the parties here, the issue was properly left to the triers of fact. The determination of the jury, which saw and heard the witnesses and which had been properly instructed on the issue (R. 455–460), is supported by substantial evidence and should not be disturbed.[6]

2. Equally without merit is the contention (Pet. 18–23) that the net worth statement and other evidence obtained from petitioner by Agent Gerson should have been suppressed because the agent did not warn him of his constitutional right against self-incrimination. The record does not support petitioner's assertion (Pet. 14, 19) that he was misled by the agent into believing that the investigation was for the purpose of determining his civil liability. There is no evidence of such deception on the part of Ger-

[6] There is no merit in the further contention (Pet. 17) that the evidence of wilfulness was insufficient. As the opinion of the court below points out (Pet. 34–35), the evidence on this issue was ample.

son. In fact the contrary appears, for petitioner was accompanied at the initial interview by his accountant, Willits, formerly a revenue agent for many years, and Gerson's introduction of himself as a representative of the Intelligence Unit (*supra*, p. 7) can only have meant to Willits that a criminal investigation was already under way. The admissibility of a defendant's extra-judicial admissions does not depend on whether or not he was warned of his constitutional rights. The test is whether they were made without compulsion or inducement. *Powers* v. *United States*, 223 U. S. 303, 312–314; *Wilson* v. *United States*, 162 U. S. 613, 621–624. See also *Montgomery* v. *United States*, 203 F. 2d 887, 892 (C. A. 5th); *United States* v. *Heitner*, 149 F. 2d 105, 107 (C. A. 2d), certiorari denied *sub nom. Cryne* v. *United States*, 326 U. S. 727; *United States* v. *Block*, 88 F. 2d 618, 620–621 (C. A. 2d), certiorari denied, 301 U. S. 690. There was no illegal search in this case. There was no seizure. There was no compulsion. There was no inducement. Petitioner's net worth statement, his records, and his answers to the agents' questions were all freely and understandingly given.

3. No showing has been made that the conduct of the prosecutor, now complained of in the petition (Pet. 23–27), can have had any

effect upon the verdict of the jury. As is clear from the petition itself the trial judge admonished the prosecutor and made it clear to the jury that they should disregard his remarks (see, *e. g.*, R. 450–452), and a similar warning was included at the outset of the court's charge (R. 453). Petitioner now attempts to magnify minor incidents in a protracted and vigorously contested trial. This was not a case such as *Berger* v. *United States*, 295 U. S. 78, 84, in which the prosecutor was guilty of putting words into the mouths of witnesses, misstating facts, assuming prejudicial facts not in evidence, suggesting that statements had been made to him out of court, bullying and arguing with witnesses. The Court of Appeals correctly concluded (Pet. 38) that no substantial rights of petitioner had been affected.

CONCLUSION

The decision of the court below is correct, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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